STATEMENT OF

THE NATIONAL EDUCATION ASSOCIATION

SUBMITTED TO THE

SPECIAL COMMITTEE ON AGING

UNITED STATES SENATE

ON

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION RULING ON RETIREE HEALTH BENEFITS

May 17, 2004

Chairman Craig and Ranking Member Breaux:

Thank you for the opportunity to testify in support of the Equal Employment Opportunity Commission's ("EEOC") final rule exempting from the prohibitions of the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), the coordination of employer-sponsored retiree health benefits with the benefits for which those retirees are eligible under Medicare (or a counterpart state-sponsored health benefits plan). 29 C.F.R. §§ 1625 and 1627 (RIN 3046-AA72).

The National Education Association's ("NEA") is a nationwide employee organization with in excess of 2.7 million members, the vast majority of whom are employed by public school districts, colleges, and universities throughout the United States. One of our top goals is to ensure that adequate health benefits are available to education employees after they retire. Therefore, we strongly support EEOC's final rule, which would remove a significant obstacle to the attainment of this goal.

NEA operates through a network of affiliated organizations, including some 13,000 local affiliates. Through collective bargaining where that is allowable, and through other means of bilateral decision-making in jurisdictions that do not provide for collective bargaining, these local affiliates represent NEA members and other education employees in dealing with their employers regarding terms and conditions of employment including compensation. A major component of the compensation provided to education employees is the health benefits that they receive while actively employed and after they have retired. And, as is the case in other sectors of the workforce, education employees are increasingly facing the prospect that retiree health benefits will be reduced or eliminated. See, e.g. General Accounting Office "Retiree Health Benefits: Employer-sponsored Benefits May Be Vulnerable to Further Erosion," GAO Doc. No. GAO-01-374 (May 2001).

As a practical matter, the EEOC's final rule addresses only one new, and for the time being, relatively small barrier to the maintenance of employer-sponsored retiree health benefits plans – the fear that a novel interpretation of the ADEA will take hold and lead to the invalidation of many commonly designed retiree health benefits plans that coordinate employer-provided benefits with Medicare. To be sure, there are other formidable barriers to the maintenance of employer-sponsored retiree health benefits plans. Those barriers include: the volatility of medical inflation; accounting standards applicable in the private sector, and soon in the public sector as well, that require employers to front load long term benefit liabilities on their balance sheets; and the increasing hostility of management towards fixed long-term labor costs. If the EEOC's final rule were prevented from taking effect, a barrier of similar magnitude would soon emerge.

The fear of the ADEA liability arose out of the blue in 2000. For decades employers and unions have been designing and implementing retiree health benefits plans on the assumption that such plans could be coordinated with Medicare, by reducing employer-sponsored health benefits to those retirees who were Medicare-eligible, without raising any issues under the ADEA. That assumption was well-founded. Notwithstanding the widespread prevalence of Medicare-coordinated retiree health benefits plans, we are not aware of any challenges to the design of such plans based on the ADEA until 2000. Then, the United States Court of Appeals for the Third Circuit disrupted the status quo with its decision in Erie County Retirees Ass'n v. County of Erie, 220 F.3d 193 (3d Cir. 2000), that invalidated such a plan and led numerous employers who sponsor such plans to fear that their plans might, too, be challenged as age discriminatory.

In Erie County, a group of Medicare-eligible retirees challenged an employer-sponsored retiree health benefits plan that distinguished between retirees who were Medicare-eligible (and thus generally over age 65) and retirees who were not Medicare-eligible. In particular, the plan provided continuation coverage to retirees under the same point of service ("POS") program (a hybrid of indemnity and managed care benefits) provided to active employees until the retirees were eligible for Medicare. Thereafter, the plan provided retirees with coverage under a health maintenance organization ("HMO") that was coordinated with Medicare. In distinguishing between groups of retirees in that way, the plaintiffs argued, the employer engaged in age discrimination and violated the ADEA. The court agreed, finding that Medicare eligibility was a proxy for age, and that the plan therefore made age-based distinctions in providing benefits. On the basis of these findings, the court concluded that the plaintiffs had made out a prima facie case for a violation of the ADEA under section 4(a)(1), 29 U.S.C. § 623(a)(1), and remanded the case to the district court to determine whether the plan could satisfy the "equal benefit equal cost" affirmative defense under section 4(f)(2)(B) of the ADEA, 29 U.S.C. § 623(f)(2)(B).

NEA believes that the court's conclusions in Erie County were wrong for two reasons. First, the correlation between Medicare-eligibility and age 65 should not have been sufficient to find a prima facie case of age discrimination when it was clear that need, and not age, drove the distinction between type of health benefits provided to the Medicare-eligible and non-Medicare-eligible retiree groups. Age was only an incidental byproduct of Congress' Medicare eligibility criteria. The obvious reason that HMO coverage was provided to the Medicare-eligible retirees, rather than the POS coverage that was provided to the other retirees, was that the Medicare-eligible retirees had benefits available to them from a source other than the plan, and the other retirees did not. If Congress had not used age as a criterion for determining Medicare eligibility, then age would not have affected, even indirectly, the level of health benefits that a retiree would have been provided under the plan. Where there was no

indication that the plan's design was based on some sort of stereotypical notions about older retirees, no prima facie case should have been found.

Second, the court failed to give proper weight to the legislative history of the Older Workers Benefit Protection Act of 1990 ("OWBPA"), which contained a clear statement in the joint "Statement of Managers" expressly providing that the practice of coordinating employer-sponsored retiree health benefits plans with Medicare eligibility is lawful under the ADEA. Specifically, the OWBPA managers stated:

> Many employer-sponsored retiree medical plans provide medical coverage for retirees only until the retiree becomes eligible for Medicare. In many of these cases, where coverage is provided to retirees only until they attain Medicare eligibility, the value of the employer-provided retiree medical benefits exceeds the value of the retiree's Medicare benefits. Other employers provide medical coverage to retirees at a relatively high level until the retirees become eligible for Medicare and at a lower level thereafter. In many of these cases, the value of the medical benefits that the retiree receives before becoming eligible for Medicare exceeds the total value of the retiree's Medicare benefits and the medical benefits that the employer provides after the retiree attains Medicare eligibility. These practices are not prohibited by the substitute. Similarly, nothing in this substitute should be construed as authorizing a claim on behalf of a retiree on the basis that the actuarial value of the employer-provided health benefits available to that retiree not yet eligible for Medicare is less than the actuarial value of the same benefits available to a younger retiree.

Final Substitute: Statement of Managers, 136 Cong. Rec. S25353 (Sept. 24, 1990); 136 Cong. Rec. H27062 (Oct. 2, 1990). The court simply was wrong in rejecting the expressly stated views of the OWBPA managers.

But even if Erie County were correctly decided, the actual results in the case – more than any question of legal theory or statutory interpretation – demonstrate best why the ruling should not stand as a matter of public policy, and why the EEOC was right to exercise its express statutory exemption authority to exempt the practice of coordinating employer-sponsored retiree health benefits with Medicare from liability under the ADEA. In the wake of the Third Circuit's decision, the case was ultimately settled not by improving the benefits provided to the Medicare-eligible retirees, but by diminishing the benefits provided to the retirees not eligible for Medicare. This is the sort of "equality" that only a lawyer could embrace. The plaintiffs' legal victory achieved nothing for themselves and only resulted in a loss of benefits to others. Because this result is the predictable outcome in any future case where the retirees not eligible for Medicare are not protected by contractual guarantees, it serves no policy purpose to force employers into a situation in

which the least costly means of complying with the statute is to reduce benefits for some retirees without raising benefits for others.

This is why NEA strongly supports the EEOC's use of its exemption power under section 9 of the ADEA, 29 U.S.C. § 628, to avoid the "unintended consequences that are not consistent with the purposes of [the ADEA] and are not in the public interest" that would result from the position taken in Erie County. 68 Fed. Reg. 4542 (Jul. 14, 2003). The EEOC exemption is borne out of the reality that an interpretation of the ADEA that would result in a net loss of employer-sponsored retiree health benefits cannot promote the purposes of the ADEA and cannot be in the public interest.

For NEA affiliates, the impact of the Erie County decision, if not mooted by the EEOC's final rule, would be particularly profound. For a variety of reasons, education employees often retire before they are eligible for Medicare. Such retirements are made possible by the availability of employer-sponsored retiree health benefits. But if the Erie County position were not exempted, NEA affiliates would face substantial negotiating problems in their attempts to maintain the employer-sponsored retiree health benefits that they previously have won. In the case of employer-sponsored plans that provide superior health benefits to those retirees not eligible for Medicare (relative to the health benefits provided to the Medicare-eligible retirees), the employers would insist on reducing or eliminating those benefits to bring their plans into compliance with the ADEA. Similarly, in the case of employer-sponsored plans that provide substantially similar coverage to all retirees, employers that no longer could afford to maintain those plans would insist on reducing or eliminating those benefits for all of its retirees – even if they could afford to continue to provide superior health benefits to retirees who were not eligible for Medicare (relative to the health benefits provided to the Medicare-eligible retirees), because to do so arguably would violate the ADEA. And, the NEA affiliates would not be able, through collective bargaining or other legal means, to force employers to retain or adopt a retiree health benefit plan design that arguably would be inconsistent with the ADEA, regardless of the economic pressure that they could bring to bear.

NEA believes that the implementation of the EEOC's final rule not only would be helpful to its affiliates' efforts to negotiate for the continuation of health benefits for retirees who are not eligible for Medicare, but – contrary to the rhetoric posed by opponents of the EEOC's final rule – would not harm their efforts to negotiate for the continuation of health benefits for Medicare-eligible retirees as well. Those opponents have argued that a high percentage of employers that sponsor retiree health benefit plans that provide substantially similar benefits to all their retirees (rather than providing inferior or no health benefits to their Medicare-eligible retirees) continue to do so because they believe that to do otherwise would violate the ADEA; and that, once the EEOC's

final rule is implemented, those employers will begin reducing or eliminating the coverage provided to their Medicare-eligible retirees.

Common sense dictates that this syllogism is false because its premises belie reality. Employers sponsor retiree health plans of all sorts because, for any number of possible reasons, they perceive – or at one time perceived – that it would be in their economic interest to do so. If that perception changes, the employer will seek to reduce or eliminate its retiree health plans to the greatest extent permitted by the contractual commitments it has made to its retirees or the union. Application of the ADEA restrictions (without the benefit of the EEOC's final rule) on this process would only affect the means by which the employer reduced or eliminated retiree health benefits, not whether it would do so at all. For example, an employer that provides substantially similar benefits to all its retirees and that desires to reduce the costs attributable to those benefits, might be required to reduce the benefits provided to all of its retirees rather than only those provided to the Medicare-eligible retirees in order to comply with the ADEA. There is no reason to believe that the Medicare-eligible retiree would be better off in such an environment, but it is clear that the retiree that is not eligible for Medicare would be worse off.

The EEOC's final rule, if implemented, would return the legal landscape for employer-sponsored retiree health plans back to the status quo before Erie County, where employers, unions, employees, and retirees can make rational economic choices based on the availability of health benefits from all sources and other factors unrelated to age, and without the specter of potential ADEA claims reducing the ability of all of the interested parties to optimize the retiree health benefits made available. In that environment, NEA affiliates will have a better chance of preserving employer-sponsored retiree health benefits for a greater number of retirees.

For all of these reasons, NEA urges the Committee to support the implementation of the EEOC's final rule without modification or delay. Thank you for considering this testimony.